Kerajaan Negeri Selangor v Suruhanjaya Pilihan Raya Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–186–10 OF 2016
AZIZUL AZMI ADNAN J
21 APRIL 2017

Civil Procedure — Discovery — Application for — Applicant filed judicial review application to challenge proposed recommendations of Election Commission in relation to its review of division of federal and state constituencies in Selangor — Applicant applied for discovery against respondents for information and materials in relation to judicial review application — Applicant also sought to cross-examine Chairman of Election Commission — Whether s 9A of the Elections Act 1958 ousts jurisdiction of court — Whether necessary to cross-examine Chairman of Election Commission — Whether application for discovery should be allowed

The State Government of Selangor ('the applicant') filed a judicial review application to challenge the proposed recommendations of the Election Commission ('the first respondent') in relation to its review of the division of the federal and state constituencies in Selangor. Prior to the judicial review application, the applicant filed the present application for discovery against the respondents for the following information and materials: (a) addresses and registration documentation; (b) names and locality codes for the 136,272 voters; (c) records of steps taken by the first respondent to implement the recommendations of the Parliamentary Select Committee ('the records'); (d) audit trail of all the changes to the voter information from first registration ('the audit trail'); and (e) access to the software application known as Electoral Geographical Information System ('EGIS'). The applicant also sought to cross-examine the chairman of the first respondent ('the second respondent') in respect of matters deposed in his affidavit in the present case. In opposing the present application, the second respondent contended that the first respondent was no longer in possession of the addresses and the registration documentation pertaining to the 136,272 addressless voters as the said information and documents had either been destroyed or lost. As the preliminary point, the respondents submitted that s 9A of the Elections Act 1958 ('the Act') ousted the jurisdiction of the court.

Held, allowing the application in part with no order as to costs:

(1) Section 9A of the Act, like any ouster clause, would not exclude the supervisory jurisdiction of the courts in circumstances where the Election Commission had, for example, exceeded its jurisdiction or committed an error of law (see para 15).

(2) The relevant documents relating to the addresses of the 136,272 voters were longer in the records of the first respondent and thus discovery of those documents would no longer be possible (see para 35).

(3) The main issue for determination was whether the redelimitation exercise could properly be carried out based on an electoral roll that did not have the addresses of some of the voters in Selangor. This was an issue that could be addressed without the need for the second respondent to be cross-examined (see para 36).

(4) The locality codes for the addressless voters in the two previous redelimitation exercises would be valuable information that may prove or disprove either party's contentions. Thus, the discovery of the locality codes was necessary for the fair disposal of the substantive application. In addition, the identity of the 136,272 voters would readily be ascertainable, and in fact had been ascertained according to the report reproduced at exh MAA12 of encl 7A. It would not be open to the first respondent to inform the court that it did not have the records and documentation relating to the addresses of these voters and yet put forward the contradicting position that those voters had not been sufficiently identified (see paras 41, 43 & 45).

(5) The records were not relevant to the substance of the challenge by the applicant. The court in this instance was concerned with the specific grounds for challenging the proposed recommendations drawn up by the first respondent for the redelimitation exercise, and not with whether the first respondent had complied with the Parliamentary Select Committee's recommendations (see para 47).

(6) The information about the audit trail was not necessary for the fair disposal of the substantive application. In the present case, the first respondent was being requested to provide records of all changes to all voters from the time of their first registration. No time limit had been stated in this application. To allow that application would simply permit the applicant to trawl through the data in a fishing expedition. For the same reason, the court dismissed the application for access to the EGIS software application (see paras 48–49).

[Bahasa Malaysia summary

Kerajaan Negeri Selangor ('pemohon') memfailkan permohonan semakan kehakiman untuk mencabar syor yang dicadangkan Suruhanjaya Pilihan Raya ('responden pertama') berkaitan semakannya terhadap bahagian kawasan

pilihan raya persekutuan dan negeri di Selangor. Sebelum permohonan semakan kehakiman tersebut, pemohon memfailkan permohonan ini bagi penemuan terhadap responden-responden untuk maklumat dan material berikutnya: (a) alamat-alamat dan dokumen pendaftaran; (b) nama-nama dan kod tempat untuk 136,272 pengundi; (c) rekod langkah yang diambil oleh responden pertama untuk melaksanakan syor Jawatankuasa Pilihan Parlimen ('rekod-rekod tersebut'); (d) jejak audit terhadap kesemua perubahan maklumat pengundi daripada pendaftaran pertama ('jejak audit'); dan (e) akses kepada permohonan perisian yang dikenali sebagai Sistem Maklumat Geografi Pilihan Raya ('EGIS'). Pemohon juga memohon untuk memeriksa balas pengerusi responden pertama ('responden kedua') berkenaan perkara yang didepos di dalam afidavitnya di dalam kes ini. Dalam menentang permohonan ini, responden kedua berhujah bahawa responden pertama bukan lagi memiliki alamat-alamat dan dokumen pendaftaran berkaitan 136,272 pengundi yang tidak beralamat kerana maklumat dan dokumen tersebut sama ada dimusnahkan atau hilang. Sebagai poin permulaan, responden-responden berhujah bahawa s 9A Akta Pilihan Raya 1958 ('Akta') menyingkirkan bidang kuasa mahkamah.

Diputuskan, membenarkan sebahagian permohonan tanpa perintah kepada kos:

(1) Seksyen 9A Akta, seperti mana-mana klausa penyingkiran, tidak akan mengecualikan bidang kuasa penyeliaan mahkamah dalam keadaan di mana Suruhanjaya Pilihan Raya telah, sebagai contoh, melebihi bidang kuasanya atau melakukan kesalahan undang-undang (lihat perenggan 15).

(2) Dokumen relevan berkaitan kepada alamat-alamat 136,272 pengundi bukan lagi terdapat di dalam rekod-rekod responden pertama dan oleh itu penemuan dokumen-dokumen tersebut tidak mungkin lagi (lihat perenggan 35).

(3) Isu utama adalah sama ada pelaksanaan persempadanan semula boleh dijalankan dengan betul berdasarkan senarai pemilih yang tidak mempunyai alamat-alamat sebahagian pengundi-pengundi di Selangor. Ini adalah isu yang boleh ditangani tanpa responden kedua perlu diperiksa balas (lihat perenggan 36).

(4) Kod tempatan bagi pengundi-pengundi yang tidak beralamat di dalam dua pelaksanaan persempadanan semula terdahulu akan menjadi maklumat yang berharga yang boleh membuktikan atau membantah sebarang perbalahan pihak. Oleh itu, penemuan kod tempatan adalah perlu bagi perlepasan adil terhadap permohonan substantif. Selanjutnya, identiti 136,272 pengundi akan mudah dapat dipastikan, dan sebenarnya telah dipastikan mengikut laporan yang dikemukakan semula di eksh MAA12 lampiran 7A. Ia tidak akan terbuka kepada

responden pertama untuk memaklumkan mahkamah bahawa ia tidak mempunyai rekod-rekod dan dokumen berkaitan alamat-alamat pengundi ini tetapi mengemukakan kedudukan bertentangan bahawa pengundi-pengundi tersebut tidak dikenalpasti secara mencukupi (lihat perenggan 41, 43 & 45).

(5) Rekod-rekod tidak relevan kepada bahan cabaran oleh pemohon. Mahkamah ini adalah mengambil berat mengenai alasan-alasan spesifik untuk mencabar syor yang dicadangkan yang dibuat oleh responden pertama untuk pelaksanaan persempadanan semula, dan bukan dengan sama ada responden pertama telah mematuhi syor-syor Suruhanjaya Pilihan Parlimen (lihat perenggan 47).

(6) Maklumat mengenai jejak audit tidak perlu bagi perlepasan adil permohonan substantif. Dalam kes ini, responden pertama diminta memberikan rekod-rekod mengenai perubahan kepada kesemu pengundi dari masa pendaftaran pertama mereka. Tiada had masa telah dinyatakan di dalam permohonan ini. Untuk membenarkan permohonan tersebut akan membenarkan pemohon untuk mencari melalui data di dalam 'ekspedisi memancing'. Bagi alasan yang sama, mahkamah menolak permohonan untuk akses kepada permohonan perisian EGIS (lihat perenggan 48–49).]

Notes

For cases on application for discovery, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3403–3434.

Cases referred to

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, HL (refd)

Kerins v McGuinness and others [2015] IEHC 293, HC (refd)

Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International) [1990] 2 MLJ 282; [1990] 1 CLJ 623; [1989] 3 MLRH 223, HC (refd)

Maria Chin bt Abdullah v Suruhanjaya Pilihan Raya [2017] 7 MLJ 133; [2017] 1 MLRH 260, HC (refd)

O'Reilly v Mackman [1983] 2 AC 237, HL (refd)

Regina (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, HL (refd)

Regina (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, CA (refd)

Rekapacific Bhd v Securities Commission & Anor and other appeals [2005] 2 MLJ 269; [2005] 2 AMR 489; [2005] 2 CLJ 108, CA (refd)

The Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55, CA (refd)

Tweed v Parades Commission [2006] UKHL 53; [2007] 1 AC 650, HL (refd)

Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994]

A 2 CLJ 581; [1993] 4 MLRH 380, HC (refd)

Legislation referred to

Civil Procedure Rules [UK]
Elections Act 1958 s 9A
B Federal Constitution art 113(2), Thirteenth Schedule, s 4
Rules of Court 2012 O 24, O 24 rr 8, 12, 13, O 53 r 6

Ambiga Sreenevasan (Derek Fernandez, Latheefa Koya, Shahid Adli and Lim Wei Jiet with her) (Daim & Gamany) for the applicant.
C *Amarjeet Singh (Alice Loke, Azizan Md Arshad, Shamsul Bolhassan and Nik Azrin Zairin bt Nik Abdullah) (Federal Counsel, Attorney General's Chambers) for the respondents.*

Azizul Azmi Adnan J:
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INTRODUCTION

[1] The applicant, the State Government of Selangor, sought to challenge the proposed recommendations of the Election Commission in connection
E with its review of the division of the federal and state constituencies in Selangor. The first respondent in this case is the Election Commission. The second and third respondents are its chairman and secretary respectively.

F **[2]** The application for leave to commence the judicial review proceedings was not opposed by the Attorney General's Chambers. Leave was granted on 16 December 2016.

[3] Shortly before the hearing of the substantive application for judicial
G review on 20 January 2017, the applicant applied for discovery against the respondents. The applicant also sought to cross-examine the Chairman of the Commission in respect of matters deposed in his affidavit in this case.

[4] The application for discovery was allowed in part. The reasons for this
H decision are set out in this judgment.

BACKGROUND

[5] On 15 September 2016, the Election Commission published a notice
I entitled 'Notice of proposed recommendations for the Federal and State Constituencies in the States of Malaya as reviewed by the Election Commission in 2016'.

[6] Under art 113(2) of the Federal Constitution, the Commission has the

power and obligation to undertake a review of the boundaries of the federal and state constituencies at intervals of no less than eight years. Section 4 of the Thirteenth Schedule to the Federal Constitution requires the effect of any proposed recommendation arising from such review to be set out in a notice. The 15 September 2016 notice was one such notice.

[7] The grounds for which the State of Selangor sought to challenge the proposed recommendations contained in the 15 September 2016 notice included the contention that the electoral roll upon which the proposed recommendations were based was defective because it showed 136,272 voters without addresses.

MATTERS FOR WHICH DISCOVERY WAS SOUGHT

[8] The materials and information for which discovery was sought were the following:

(a) the addresses in electronic format of 136,272 voters in the State of Selangor whose addresses do not appear on the electoral roll;

(b) the voter registration documentation relating to these 136,272 addressless voters;

(c) the locality code and locality name in electronic format for the 136,272 addressless voters for the last two delimitation exercises carried out in 1994 and 2003 in respect of the States of Malaya (the States of Malaya is one of two units of review under the Federal Constitution);

(d) the reports, minutes and documentation on the steps taken by the Election Commission to implement the recommendations of, or to address the issues raised by, the Parliamentary Select Committee established to improve the election process;

(e) an audit trail (in electronic format) of all voters in Selangor, reflecting all changes to voter information since the registration of a person as a voter; and

(f) the computer software application known as Electoral Geographical Information System ('EGIS') used in the delimitation exercise for Selangor.

THE EVIDENCE FROM THE ELECTION COMMISSION

[9] In opposing the application for discovery, the Chairman of the Commission deposed an affidavit stating that the Commission was no longer in possession of the addresses and the registration documentation pertaining to the 136,272 addressless voters. The reason for this was that these information and documents have either been destroyed or lost. In the original language of

his affidavit, the Chairman of the Commission had stated that:

> ... dokumen-dokumen ini telah dilupuskan (see para 12 of encl 37).

[10] According to his affidavit evidence, the registration of voters prior to 2002 was undertaken manually by the Election Commission. After this date, the Commission migrated to a computerised system, where only the locality data was retained for some electors (see paras 10–12 of encl 31).

DECISION

[11] Having heard the arguments advanced by the parties, I allowed discovery of one of the categories of information sought (specifically, the locality code and locality name in respect of the addressless voters in the last two delimitation exercises, referred to at para 8(c) ante). I dismissed the application for discovery of the other materials and information. I also dismissed the application to cross-examine the Chairman of the Commission.

[12] Both the applicant and the respondents have now appealed against this decision, the reasons for which are explained here.

SECTION 9A OF THE ELECTIONS ACT 1958

[13] In the course of oral submissions, Ms Loke, senior federal counsel, contended that s 9A of the Elections Act 1958 ousts the jurisdiction of the court. I deal with this issue as a preliminary point before addressing the substantive discovery application.

[14] Section 9A provides as follows:

> 9A Certified or re-certified electoral roll shall be deemed to be final
>
> After an electoral roll has been certified or re-certified, as the case may be, and notice of the certification or recertification has been published in the Gazette as prescribed by regulations made under this Act, the electoral roll shall be deemed to be final and binding and shall not be questioned or appealed against in, or reviewed, quashed or set aside by, any court.

[15] In my judgment, the State of Selangor does not seek to challenge the finality or binding effect of the electoral roll per se. What is the subject of the challenge are the proposed recommendations of the Election Commission contained in the notice of 15 September 2016, the principal contention being that these recommendations are ultra vires the Constitution. In any event, s 9A, like any ouster clause, would not exclude the supervisory jurisdiction of the courts in circumstances where the Election Commission has, for example, exceeded its jurisdiction or committed an error of law.

[16] In the following paragraphs, I set out the applicable principles relating to discovery and cross-examination in the context of judicial review applications. Thereafter, at paras 33 et seq. I address the specific categories of documents and information that were the subject of the discovery application.

DISCOVERY AND CROSS-EXAMINATION IN JUDICIAL REVIEW PROCEEDINGS

Generally

[17] Order 53 r 6 of the Rules of Court 2012 empowers the court to grant discovery in a judicial review application pursuant to O 24. Under O 24 r 12 the court may grant an order for discovery of, among others, documents on which a party will rely for its case and documents that could adversely affect or support its case. However, under O 24 r 13, an order for discovery can only be given by the court if it is of the opinion that the order is necessary for disposing fairly of the cause or matter or for saving costs.

[18] In order to succeed in its application for discovery, an applicant must establish the three essential elements identified by the Edgar Joseph Jr SCJ (delivering the judgment of the High Court) in *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581; [1993] 4 MLRH 380:

> The essential elements for an order for discovery are threefold; namely, first, there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought.

[19] The test of whether a document is relevant is found in O 24 r 12, which incorporates the common law position enunciated in *The Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55. It ought to be noted that it suffices if the court forms the view that the document for which discovery is sought may — not must — advance an applicant's case: see the Singapore High Court case of *Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International)* [1990] 2 MLJ 282; [1990] 1 CLJ 623; [1989] 3 MLRH 223.

JUDICIAL REVIEW PROCEEDINGS

[20] It is common ground between the parties that discovery or cross-examination in judicial review proceedings is only ordered rarely.

[21] In the leading case of *Rekapacific Bhd v Securities Commission & Anor and other appeals* [2005] 2 MLJ 269; [2005] 2 AMR 489; [2005] 2 CLJ 108,

the Court of Appeal was of the view that (see para 11 of the judgment of the court, delivered by Gopal Sri Ram JCA):

(a) the applicable test for determining whether *cross-examination* ought to be permitted in judicial review proceedings is governed by the same principles as actions begun by originating summons, which is that it should be allowed whenever the justice of the particular case so requires (following the dicta of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237); and

(b) the applicable test for determining whether *discovery* ought to be permitted in judicial review proceedings is that discovery should not be ordered unless and until the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty; and it should be limited strictly to the documents relevant to the issue which emerges from the affidavits (following the dicta of Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617).

[22] It will be seen that Lord Scarman's formulation predicates that some form of evaluation of the merits of the case must be undertaken by the court, a point that I will return to shortly.

[23] In delivering the judgment of the court in the *Rekapacific* case, Gopal Sri Ram JCA (as His Lordship then was) cited with approval passages from Richard Gordon's *Judicial Review and Crown Office Practice*. These include the following summation of the applicable general principles:

> In general, the following principles appear to govern the grant or refusal of discovery under O 53:
>
> (a) Discovery will not be ordered so as to make good defects in the applicant's evidence (*R v Inland Revenue Commissioners, ex p Taylor* [1988] 1 COD 61; *R v Secretary of State for Education, ex p J* [1993] 1 COD 146; *R v Inland Revenue Commissioners, ex p National Federation of Small Employed and Small Businesses Ltd* [1982] AC 617 at p 635H).
>
> (b) One will seldom obtain full private law type discovery in a *Wednesbury* challenge (*R v Secretary of State for the Environment, ex p Smith* [1988] COD 3).
>
> (c) By contrast, discovery will be ordered under O 53 where it is required so that the justice of the case may be advanced and where it is necessary for disposing fairly of the matter (within the meaning of O 24 r 8) (see *R v Inland Revenue Commissioners, ex p J Rothschild Holdings Plc* [1987] 1 STC 163; *R v Governor of Pentonville Prison, ex p Herbage (No 2)* [1987] 1 QB 1077).

(d) Discovery will also be ordered to go behind the contents of affidavits if there was some matter before the court which suggested that the contents of the affidavits were not accurate (*Re H*, The Guardian, 17 May 1990). By contrast, discovery will not be ordered where there is no reason to doubt the bona fides or accuracy of the reasons given on affidavit (see *R v Secretary of State for the Environment, ex p Islington LBC* [1992] COD 67; *R v Secretary of State for Health, ex p LB of Hackney* [1994] 1 COD 432).

[24] At paras 3-662 of *Judicial Review and Crown Office Practice*, the author discusses the test formulated by Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* and entertains some doubt as to whether an evaluation of the merits will be necessary in a discovery application, given that an applicant would have already satisfied the court that it had an arguable case at the leave stage. The relevant passages are set out below:

> It is, however, questionable whether, as a preliminary requirement, the court must attempt an evaluation of merits. Interlocutory relief will be granted only after leave has been given to apply for judicial review. In that sense therefore an applicant seeking discovery has, ex hypothesi, an arguable case for asserting a breach of public duty. In *R v Secretary of State for Transport, ex p ABH Road Safety Limited* [1993] COD 150 Schiemann J left open the possibility that, in an appropriate case, the grant of leave in judicial review may sometimes be taken to establish a prima facie ground of irrationality, thereby justifying an order for discovery. Certainly, following the grant of leave it is difficult to see what else the court can do when considering discovery/inspection beyond determining whether potentially discoverable documents are relevant to the issues between the parties.
>
> Given the two-stage procedure under O 53 it may be that Lord Scarman was merely emphasising the overall hurdles to be surmounted before discovery could become available. Even if these hurdles are surmounted the doctrine of public interest immunity would appear to have more scope, having regard to the nature of judicial review, as a means of opposing an order for discovery in O 53 proceedings.

[25] This passage in Richard Gordon's book was also cited with approval by the Court of Appeal, but without any discussion on how Lord Scarman's test inter-related with the principle stated in O 24 r 8 of the Rules of Court 2012, which is that discovery may only be ordered if it is necessary for disposing fairly of the cause or matter or for saving costs.

[26] I align my views with those of the learned author Richard Gordon, whose book Gopal Sri Ram JCA described as the *locus classicus* on the subject. In my view, the dicta by Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* was not intended to establish any requirement on the court to undertake a further review of the merits of the case in deciding on an application for discovery; that will be a matter for the substantive hearing. An initial evaluation of the merits of the case

will necessarily have already been conducted by the courts at the leave stage: see the views of this court in *Maria Chin bt Abdullah v Suruhanjaya Pilihan Raya* [2017] 7 MLJ 133; [2017] 1 MLRH 260, at para 14. Whether discovery ought to be ordered in a judicial review application depends on whether the justice of the case may be advanced and whether it is necessary for disposing fairly of the matter (see para (c) reproduced at para 23, ante).

[27] The position in the United Kingdom regarding discovery (now termed 'disclosure' under its Civil Procedure Rules) has moved away from any notion of a more restrictive rule applicable for judicial review proceedings, to 'a more flexible and less prescriptive principle', with the decision of the House of Lords in *Tweed v Parades Commission* [2006] UKHL 53; [2007] 1 AC 650. Lord Carswell in that case held:

> [I]t would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ. Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice. This object will be assisted if parties seeking disclosure continue to follow the practice where possible of specifying the particular documents or classes of documents they require, as was done in the case before the House, rather than asking for an order for general disclosure.

[28] In the Irish case of *Kerins v McGuinness and others* [2015] IEHC 293, the High Court explained that the rarity of discovery orders in judicial review proceedings arise not from the application of any specific principle of law, but rather from the nature of the proceedings themselves:

> 29. From a perusal of the relevant case law three principles emerge, which are required to be outlined below. The court is aided in this process by reference to the judgment of Ó Caoimh J in *Shortt v Dublin City Council* [2003] 2 IR 69 — where it was noted that the rarity with which discovery is ordered in judicial review proceedings is not due to any latent restriction in the right to apply for that order, rather it is simply a natural consequence of the fact that its necessity will be more difficult to establish in judicial review proceedings. Therefore the three principles which emerge are: first, discovery is more rarely granted in judicial review proceedings, second, that notwithstanding the rarity at which discovery may be granted, the court is still permitted to grant a discovery order if the documents are relevant and necessary and that such discovery will lead to a fair disposal of the matter, and third, the court, in so acting, must look at the nature of the proceedings in order to ascertain whether the documents are both relevant and necessary. It is undoubtedly the position that the standard test of relevance and necessity will be more difficult to establish in the context of judicial review proceedings.

[29] Thus, the fact that discovery is rarely ordered in judicial review proceedings is a consequence of the fact that the necessity for disclosure would be difficult to establish, as in the majority of cases the facts would not be in dispute. This view echoes that of Lord Bingham in *Tweed v Parades Commission*:

> The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. But the process of disclosure can be costly, time-consuming, oppressive and unnecessary, and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary, and that remains the position.

[30] The third principle in the judgment of Kennedy J in *Kerins v McGuinness and others* is also instructive: in determining what materials are relevant and necessary for the fair disposal of the matter, regard must be had to the nature of the proceedings in question. This same principle is reflected in the speech of Lord Carswell in *Tweed v Parades Commission*, where he refers 'the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances'.

[31] This principle is significant because, in my view, it entitles the court to have regard to the nature of the rights purported to have been infringed by the actions of the public authority, a point that I will return to later in this judgment.

[32] The application for discovery will be evaluated in the light of the foregoing principles.

ANALYSIS

[33] Each of the categories of materials and information sought in the discovery application are addressed in turn in the following paragraphs.

Addresses and registration documentation

[34] The addresses and registration documentation relating to the 136,272 addressless electors are dealt with together.

[35] I accepted the evidence of the Election Commission that the relevant documents relating to the addresses of the 136,272 voters are longer in the records of the Commission and thus discovery of those documents would no

A longer be possible, see *Yekambaran Marimuthu v Malayawata Steel Bhd*, discussed at para 18 ante.

B **[36]** In my judgment, the main issue for determination is whether the redelimitation exercise can properly be carried out based on an electoral roll that does not have the addresses of some of the voters in Selangor. This is an issue that, to my mind, can be addressed without the need for the chairman of the Election Commission to be cross-examined. We are not concerned with why the records of the addresses have not been kept by the Election Commission, but rather with the question of whether the residency of a person C within a particular constituency can be ascertained without records of his earlier addresses being kept by the Election Commission. If the enquiry were the former, then I would agree with the contention of the counsel for the applicant that the cross-examination of the chairman of the Commission would be critical to establish the basic facts. Here, however, the Election D Commission readily concedes that it does not have the addresses of the 136,272 voters and that all it has are the records of the locality of such voters, which it contends are sufficient for the purposes of a redelimitation exercise. Whether this is indeed the case is a matter for the court to ascertain at the hearing of the substantive application for judicial review.

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[37] I was therefore of the view that the cross-examination of the chairman of the Election Commission will not aid in establishing the basic facts necessary to facilitate the hearing of the substantive application.

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Names and locality codes for the 136,272 voters

[38] The third category of documents for which discovery was sought were the names and the locality codes for the 136,272 addressless voters in the two G previous delimitation exercises carried out in 1994 and 2003 for Peninsular Malaysia.

[39] The Commission's position is that the address of a voter is not required for the purposes of producing an electoral roll and for that roll to be used in a H redelimitation exercise.

[40] The applicant contended otherwise. According to the affidavit affirmed in support of the application, boundaries of a locality may change over time, as the area within which a locality is located changes by reason of population I expansion and improvements in infrastructure.

[41] In my view, the locality codes for the addressless voters in the two previous redelimitation exercises would be valuable information that may prove or disprove either party's contentions. For example, if the information on

the locality of the addressless voters establishes that the localities have been correctly recorded by reference to the current records for that voter at the National Registration Department, then it could not be said that the redelimitation exercise was flawed by reason of reliance on an electoral roll that did not contain the addresses of the 136,272 voters.

[42] Of course, the mere fact that a voter's locality does not match his or her current address does not necessarily mean that the electoral roll is flawed, for the residency of a voter in the electoral roll is only changed if the voter makes an application to change his constituency. Nonetheless, if the locality code can be shown to have somehow been incorrectly recorded — whether by reason of the division of locality over time or otherwise — then the applicant's case for review is made stronger.

[43] I was therefore of the view that the discovery of the locality codes were necessary for the fair disposal of the substantive application.

[44] Senior federal counsel contended that the application was flawed because the application did not state the names of the 136,272 addressless voters.

[45] In my view, the identity of the 136,272 voters would readily be ascertainable, and in fact has been ascertained according to the report reproduced at exh MAA12 of encl 7A. In any event, the Election Commission's position was that it no longer has the addresses of these 136,272 voters, and thus for it to have come to so categorical an answer, it must have had the names of the voters at hand in order to have been able to identify them. It would not be open to the Election Commission to inform the court that it did not have the records and documentation relating to the addresses of these voters and yet put forward the contradicting position that those voters had not been sufficiently identified.

[46] What is relevant and necessary for the fair disposal for the substantive application is to be ascertained from the surrounding facts and circumstances of the case, including the nature of the proceedings: see para 30, ante. In my view, if the challenge relates to a fundamental and constitutionally-guaranteed right, such as the right to vote, or the right to free and fair elections, the court would be entitled to take an expansive view of what documents would be necessary for the fair disposal of the challenge. This is an embodiment of the principle that the intensity of review in a public law case will depend on the subject matter at hand (per Laws LJ in *Regina (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840). In the words of Lord Steyn, in law context is everything *(Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532).

Records of steps taken by the Election Commission to implement the recommendations of the Parliamentary Select Committee

[47] I was of the view that these records are not relevant to the substance of the challenge by the applicant. The court in this instance is concerned with the specific grounds for challenging the proposed recommendations drawn up by the Election Commission for the redelimitation exercise, and not with whether the Election Commission has complied with the PSC recommendations.

Audit trail of all the changes to the voter information from first registration

[48] I was of the view that this information was not necessary for the fair disposal of the substantive application. The enormity of this request needs to be appreciated. Here the Election Commission was being requested to provide records of all changes to all voters from the time of their first registration. No time limit has been stated in this application. I was of the view that to allow that application would simply permit the applicant to trawl through the data in a fishing expedition.

Access to the EGIS software application

[49] I dismissed the application for access to the EGIS software application for the same reason that I refused the application for disclosure of the audit trail information.

[50] Having dismissed the application for discovery of all but one of the categories of documents or information on the basis that these materials would not be necessary for the fair disposal of the judicial review proceeding, it would follow as a necessary corollary that there would be no basis for permitting the cross-examination of the chairman of the Election Commission. As a consequence, the application to cross-examine was also refused.

[51] As the application was allowed in part only, I ordered that there be no order as to costs.

Application allowed in part with no order as to costs.

Reported by Dzulqarnain Ab Fatar